**Scepter Ingot Castings, Inc. *and* Shopman's Local Union No. 733 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO.** Case 26–CA–17345

May 24, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On October 15, 2003, Administrative Law Judge George Carson II issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

In 1995, the Respondent circulated a memo to its employees, introducing certain substantive changes to the Respondent's Group Health Care Plan and announcing that employees covered under the Plan would have to begin contributing to their health care coverage. Previously, the employees had made no contribution toward their health insurance. The memo also announced a wage increase of 15 cents per hour "[t]o help offset this new employee contribution." These changes took effect immediately, without notice to or any effort to bargain with the employees' bargaining representative.

In an earlier proceeding in this case, the Board found that each of the foregoing changes was made unilaterally and therefore violated Section 8(a)(5) of the Act. *Scepter Ingot Castings*, 331 NLRB 1509, 1515, 1516 (2000).[1] The Board ordered the Respondent to cease and desist from unilaterally granting wage increases and changing health insurance coverage or rates, id. at 1517, and to make employees whole for any expenses resulting from its unilateral changes in health insurance coverage and contributions, id. at 1510. The Board also ordered the Respondent to rescind either or both of its unilateral changes concerning wage rates and medical insurance coverage, "[i]f requested by the Union." Id. at 1517. The Board's Order was enforced in its entirety by the Court of Appeals for the D.C. Circuit. *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1058 (D.C. Cir. 2002). In April 2003, the General Counsel issued a Compliance Specification alleging a backpay period beginning October 1995 and continuing until at least September 2002.

In the present proceedings, the Respondent does not dispute its obligation, pursuant to the Board's Order, to make employees whole for the health insurance premiums they paid. The Respondent argues, however, that it has already discharged its obligation. According to the Respondent, the wage increase more than offset the health insurance premiums paid by employees, and therefore no further payment is necessary to make employees whole.

We lack jurisdiction to grant the requested offset. Under Section 10(e) of the Act, we have no jurisdiction to modify an Order that has been enforced by a court of appeals because, upon the filing of the record with the court of appeals, the jurisdiction of that court is exclusive and its judgment and decree final, subject to review only by the Supreme Court. *Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001) (Board has no jurisdiction to modify a court-enforced Order); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997) (same); *Haddon House Food Products*, 260 NLRB 1060 (1982) (same). The jurisdictional limitations imposed by Section 10(e) are implicated in this case because the Respondent's requested offset would effectively modify the Board's court-enforced Order. That Order provided, inter alia, that the Respondent's unilateral wage increase should be rescinded "[i]f requested by the Union." *Scepter Ingot Castings*, supra at 1517. The offset the Respondent argues for would modify this portion of the Order by effectively rescinding the wage increase—by applying it to eliminate the Respondent's backpay liability—for the duration of the backpay period, without any request from the Union. Regardless of the merits of such a modification, upon which we do not pass, we are without jurisdiction to grant it. See *Regional Import & Export Trucking*, supra (denying employer's request for offset for lack of jurisdiction under Section 10(e) because offset would "effectively require modification of the Board's [previously enforced] Order").

We also note that the Board's Order was sufficiently clear to place the Respondent on notice that it might be obligated, by its terms, to rescind the health insurance changes but not the wage increase. The Respondent did

[1] Member Schaumber notes that he did not participate in the underlying case. If the issue were properly before the Board at this time, he would find, as the dissent does, that the order contravenes the principle that a Board order should not afford any party a windfall in excess of the amount required to make the party whole for losses suffered as a consequence of the Respondent's unlawful conduct. For the reasons set forth herein, however, he agrees with Member Walsh that the Board is simply without authority to consider this issue at this stage of the proceeding.

not specifically except to the imposition of this remedial requirement in its exceptions to the judge's decision.[2] Rather, the Respondent generally excepted to the proposed order and to "the ALJ's findings that the charging parties are entitled to any remedy." As the D.C. Circuit held in *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*,[3] such general exceptions "merely reassert[ ] that [a respondent] did not violate the Act and therefore that no remedial order at all is necessary or proper. A categorical denial does not place the Board on notice that its particular choice of remedy is under attack, much less that its failure to explain that choice is also the subject of a challenge. To hold otherwise would be to set up the Board for one ambush after another."[4] Having failed to raise the windfall issue before the Board at the merits stage, the Respondent was precluded from raising it in the court of appeals, see Section 10(e), let alone before the Board in this compliance-stage proceeding. See *Grinnell Fire Protection Systems Co.*, supra (citing *Yorkaire, Inc.*, 328 NLRB 286, 288 (1999)).

This conclusion is not disturbed by our dissenting colleague's view that the requested offset would not rescind the wage increase, but merely reallocate it to "minimize or eliminate any loss the employees sustained as a result of the separate insurance contribution violation." Such a reallocation is not consistent with the terms of the Board's Order, which, as we have stated above, imposes two distinct requirements on the Respondent. First, the court-enforced Order requires the Respondent to make employees whole for any expenses resulting from unilateral changes in health insurance contributions. Separately, it obligates the Respondent to rescind its unilateral wage increase only if the Union so requests, and the Union has not so requested. By crediting the wage increase toward the Respondent's fulfillment of its first obligation, the dissent effectively relieves the Respondent of its second. Our colleague says he is not rescinding the wage increase, he is permitting the offset. Regardless of how it is characterized, the result would be the same: to take away from employees 7 years' worth of wage increase. As we have explained, Section 10(e) leaves us without power to alter the terms of the Board's Order in this way. Thus, we affirm the judge's denial of the offset.

[2] Similarly, although the Respondent filed two motions for reconsideration with regard to the affirmative bargaining order, neither motion addressed the provision added to the judge's order by the Board requiring the Respondent to make whole employees for losses suffered as a result of the unilateral change in medical insurance coverage.

[3] 87 F.3d 493, 497 (D.C. Cir. 1996) (internal citation omitted).

[4] Indeed, the D.C. Circuit expressly recognized that the Respondent's exceptions in this case suffer from this deficiency when it rejected its separate claim that an affirmative bargaining order was not warranted. *Scepter, Inc. v. NLRB*, supra, 280 F.3d at 1057.

ORDER

The National Labor Relations Board orders that the Respondent, Scepter Ingot Castings, Inc., New Johnsonville, Tennessee, its officers, agents, successors, and assigns, shall make whole the individuals named below, by paying them the amounts following their names, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws:

| | |
|---|---|
| Adkins, Steven | $284.00 |
| Allen, Donald | $1,450.00 |
| Anderson, Kevin | $104.00 |
| Arnold, Johnny | $92.00 |
| Avalon, Chris | $476.00 |
| Bailey, Michael | $342.00 |
| Bain, George | $138.00 |
| Barrett, Scott | $46.00 |
| Bell, Jeremy | $23.00 |
| Bennett, Matthew | $529.00 |
| Birdwell, Darren | $28.00 |
| Blakemore, Robert | $280.00 |
| Bland, Charles | $185.85 |
| Blankenship, Bart | $76.00 |
| Blankenship, Brett | $1,857.06 |
| Blue, Tyler | $577.20 |
| Bowen, Raymond | $1,998.12 |
| Boyer, Christopher | $373.37 |
| Brake, Kevin | $56.00 |
| Breeden, David | $1,005.81 |
| Breeden, Richard | $1,315.93 |
| Brockly, William | $172.28 |
| Browning, Charles | $480.00 |
| Bruce, Patrick | $391.00 |
| Buchanan, Christopher | $562.41 |
| Burlison, Richard | $184.00 |
| Butler, Daren | $256.00 |
| Campbell, Terry | $2,191.92 |
| Capps, Larry | $1,776.19 |
| Carruth, James | $44.24 |
| Carter, James | $168.00 |
| Clark, Matthew | $320.90 |
| Coleman, Stacy | $267.20 |
| Conrad, Jr., Hugh | $161.00 |
| Cooper, Eddie Joe | $522.02 |
| Cowell, Kevin | $736.00 |
| Cowell, Michael | $161.00 |
| Cowen, Glen | $144.00 |
| Crafton, David | $57.00 |
| Craig, Douglas | $24.00 |
| Crum, Jeremy | $115.00 |
| Crutchfield, Tommy L. | $693.52 |

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|---|---|
| Culp, Jonathan | $679.00 |
| Cummings, William | $616.42 |
| Curtis, Joseph | $46.00 |
| Curtis, Stacy | $812.00 |
| Curtis, Tony | $392.00 |
| Dacus, Chad | $759.00 |
| Darrow, John | $28.00 |
| Davidson, William | $1,372.00 |
| Davis, Jonathan | $253.00 |
| Dellinger, Robert | $92.00 |
| DeMoss, Jonathan | $26.00 |
| Dodson, Christopher | $322.00 |
| Dorris, Landon | $81.84 |
| Dorris, Phillip | $13.00 |
| Douglas, Jerry | $364.00 |
| Duke, Jeffrey | $56.00 |
| Eads, Terry | $1,856.00 |
| Elliott, Phillip | $224.00 |
| Ellis, Clint | $476.00 |
| Ellis, Edward | $12.92 |
| Fajardo, Jr., Rodolfo | $789.16 |
| Faulkner, Clyde | $376.90 |
| Fields, Mark | $476.00 |
| Fischer, Jonathan | $10.62 |
| Flowers, Christopher | $368.00 |
| Forrest, Danny | $736.00 |
| Forrester, Jonathan | $171.00 |
| Fortner, Billy | $1,645.48 |
| Fortner, Jonathan | $1,402.48 |
| French, James | $1,318.00 |
| Fuller, Gerald | $394.00 |
| Gembala, Scott | $44.00 |
| Gibbons, Corey | $230.00 |
| Gibson, Stephen | $34.50 |
| Gidcomb, Thurston | $626.70 |
| Glenn, Walter | $23.00 |
| Greenwell, Christopher | $115.00 |
| Greer, James | $644.00 |
| Greer, Joshua | $858.00 |
| Gregory, Cheri | $568.00 |
| Hamilton, Cynthia | $615.92 |
| Hargrove, James | $512.00 |
| Harris, Johnny | $53.84 |
| Harwell, Alan | $1,882.00 |
| Hassell, Clarence | $256.00 |
| Henley, Kenneth | $110.00 |
| Hill, David | $754.00 |
| Hill, Wesley | $230.00 |
| Himes, Steven | $424.00 |
| Holland, Joshua | $57.00 |
| Holland, Larry B. | $52.00 |
| Hollingsworth, Anthony | $168.00 |
| Hollingsworth, Jason | $124.00 |
| Hollingsworth, Jeffrey | $115.00 |
| Hooper, Adam | $57.50 |
| Hooper, Harris | $288.44 |
| Hooper, Joseph Earl | $316.00 |
| Hooper, Joshua | $69.00 |
| Horton, Jonathan | $596.56 |
| Hughes, Randall | $112.00 |
| Hunt, Billy | $69.00 |
| Innis, William | $276.00 |
| Ivey, Jason | $209.00 |
| Jackson, Anthony | $112.00 |
| Jackson, Donald | $28.00 |
| Jackson, Joshua L. | $26.00 |
| James, Ronald | $710.00 |
| Jensen, Michael | $46.00 |
| Jewell, Billy | $644.00 |
| Johnson, James | $84.00 |
| Jungers, Shane | $92.00 |
| Kelley, James | $12.00 |
| Kilburn, Jeffrey | $504.00 |
| Kilburn, Johnny | $1,278.00 |
| King, Jason | $138.00 |
| Lashlee, Keith | $511.37 |
| Lee, Barbara | $56.00 |
| Leibli, Steven | $1,046.00 |
| Little, Charles | $556.00 |
| Little, Randall | $140.00 |
| Livingston, David | $1,056.24 |
| Long, Karen | $48.00 |
| Loveless, Marlin | $2,014.00 |
| Lowe, Tim | $19.00 |
| Lowery, Robert | $24.00 |
| Lunsford, Donnie | $260.00 |
| Malesevich, John | $11.50 |
| Maness, Dwayne | $140.00 |
| Marlin, David | $690.00 |
| McCallum, Kevin | $550.00 |
| McGuire, James | $266.00 |
| McGuire, Jerry | $56.00 |
| McKinney, Matthew | $63.72 |
| Medlin, Earl | $992.00 |
| Melton, Kenneth | $288.00 |
| Miller, Stephen | $46.00 |
| Minton, Craig | $115.00 |
| Moore, Brian | $1,780.00 |
| Moran, Joseph | $2,107.92 |
| Moran, Tim | $24.00 |
| Morris, Jeffrey | $24.00 |
| Mosley, Donnie | $180.00 |
| Nix, Jason | $184.00 |
| Oatsvall, Richard | $598.00 |

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|---|---|
| O'Brien, Patrick | $204.00 |
| O'Daniel, Corey | $69.00 |
| Osborne, Rick | $96.00 |
| Osgood, Christopher | $808.64 |
| Papadakis, James | $576.82 |
| Pate, Sidney | $156.00 |
| Patrick, Donna | $312.00 |
| Patterson, James | $69.00 |
| Patterson, Pennie | $952.00 |
| Payne, Eddie Joe | $26.00 |
| Peach, Christopher | $159.24 |
| Peach, Randall | $281.31 |
| Perry, Tommy | $168.00 |
| Pfifer, Christopher | $138.00 |
| Phillips, Steven | $39.00 |
| Pollock, William | $2,045.34 |
| Price, Timothy | $198.00 |
| Prince, Donald | $506.00 |
| Rayburn, Robert | $2,052.00 |
| Rayburn, William | $194.62 |
| Reese, William | $1,739.02 |
| Rendon, Anthony | $69.00 |
| Reynolds, David | $140.00 |
| Roberts, Daniel | $396.37 |
| Roberts, Jeff | $38.00 |
| Robinson, Jeffrey | $396.00 |
| Robison, James | $182.00 |
| Rodgers, Deborah | $56.00 |
| Rogers, James | $262.00 |
| Ross, Mark | $23.00 |
| Salas, Pedro | $152.90 |
| Santiago, Darwin | $196.00 |
| Santiago, Nelson | $24.00 |
| Sawyer, Carolyn | $56.00 |
| Schmitt, Jeremiah | $138.00 |
| Schmitt, Jeremiah | $253.00 |
| Schwerdtfeger, James | $138.00 |
| Scott, Donald | $400.00 |
| Sedor, Joseph | $161.00 |
| Shannon, Jeffrey | $112.00 |
| Slater, James | $72.00 |
| Smith, David | $281.00 |
| Smith, James | $2,191.92 |
| Smith, Jason M. | $104.00 |
| Smith, Johnny | $56.00 |
| Smith, Mike | $26.00 |
| Smith, Tom | $575.00 |
| Smith, Wesley | $1,574.41 |
| Spence, Sandra | $92.00 |
| Stanfield, Chad | $1,152.00 |
| Stanfield, Stephen E. | $23.00 |
| Stepp, Stacy | $360.00 |
| Story, Thomas | $872.00 |
| Story, Jr., Joe | $28.00 |
| Sutton, James | $76.00 |
| Sutton, Roger | $46.00 |
| Taylor, Daniel | $336.00 |
| Terry, Christopher | $424.68 |
| Thomas, Jeffrey | $876.00 |
| Tidwell, Bobby | $104.00 |
| Tolnay, John | $84.00 |
| Toungette, Ronnie | $72.00 |
| Travis, William | $120.00 |
| Triplett, Abbie | $24.00 |
| Truell, Lisa | $56.00 |
| Turner, Demond | $168.00 |
| Turner, John H. | $2,127.32 |
| Turner, Patrick | $184.00 |
| Turner, Timothy | $161.00 |
| Utley, Douglas | $104.00 |
| Vail, William | $418.00 |
| Vasquez, Jorge | $316.00 |
| Vester, Kevin | $104.00 |
| Waggoner, Brent | $59.86 |
| Warner, Michael | $651.00 |
| Warren, Jr., Kenneth | $46.00 |
| Waters, Jeffrey | $84.00 |
| Webb, Bobby | $594.42 |
| Weston, Dennis | $280.00 |
| Whitsett, Rodney | $312.00 |
| Williams, Brad | $189.00 |
| Williamson, James C. | $230.00 |
| Wilson, Jason S. | $467.00 |
| Winstead, George | $26.00 |
| Wiser, Derek | $288.00 |
| Wright, Mitch | $140.00 |
| Young, Kenneth | $92.00 |
| Zills, Jason | $1,321.00 |
| TOTAL | $96,816.92 |

Dated, Washington, D.C. May 24, 2004

Peter C. Scaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

I disagree with the judge's and my colleagues' failure to permit the Respondent to offset, from the amount it must reimburse employees for unilaterally imposed health insurance contributions, the wage increase Respondent granted to those employees precisely for the purpose of funding those contributions. In my view, denying this offset creates a windfall for the employees and punishes the Respondent. Further, I disagree that such an offset runs afoul of Section 10(e) of the Act.

The purpose of the Board's make-whole remedy is to put discriminatees in the position they would have been in but for the unlawful action against them. It is not to punish the respondent employer or union. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). Nor is the purpose of backpay to enrich discriminatees. *Master Appliance Corp.*, 164 NLRB 1189, 1190 (1967); *Taracorp Industries*, 273 NLRB 221, 223 (1984). "The make-whole statutory scheme established by the Act is exclusively remedial. The Board may not use its processes to punish anyone." *Kenmore Contracting Co.*, 303 NLRB 1, 5 (1991).

Here, the court-enforced Board Order required the Respondent to "[m]ake employees whole for any expenses ensuing from [its] unilateral changes in medical insurance coverage and contributions." Implicit, if not express, in this language is that employees are to be compensated only if they suffered any expenses as a result of the Respondent's unilateral change. Because the Respondent, concurrent with its unilateral change in insurance contributions, granted employees 15 cents per hour in order to cover their new costs, the employees incurred no expenses. Thus, they should not receive the wage increase *and* be compensated for increased premiums.[1]

Concededly, the 15-cent increase was itself a unilateral change that the Respondent was obligated to rescind only if requested by the Union. Because the Union did not request its rescission, I agree that the Respondent was not free to discontinue this wage increase. This does not mean, however, that this increase cannot be used to minimize or eliminate any loss the employees sustained as a result of the separate insurance contribution violation. To hold otherwise would provide a windfall for already compensated employees and serve a punitive rather than remedial purpose.

Contrary to my colleagues, I do not agree that the Respondent was precluded from raising the offset issue in the compliance stage of this proceeding. As noted above, the Board Order required the Respondent to "make employees whole" for the changes regarding medical insurance. Respondent does not here challenge this order. Rather, it argues that the amount of money sought by the General Counsel does more than "make the employees whole." It gives them a windfall. The compliance proceeding is the precise forum for making that contention. The purpose of a compliance proceeding is to determine the amount of money that is necessary to make the employees whole. Thus, the Respondent rightfully contends, in this compliance proceeding, that the amount sought by the General Counsel does more than make the employees whole.

Further, offsets are typically litigated in compliance proceedings, as that is the stage in which a make-whole remedy is determined. Here, as found by the judge, the Respondent filed a timely answer and amended answer to the compliance specification affirmatively pleading the offset. Therefore, unlike my colleagues, I find that the offset issue was timely raised by the Respondent.

Nor do I agree with my colleagues and the judge that an offset runs afoul of Section 10(e). The Board and court merely ordered that employees were to be made whole for any losses they incurred from the change in insurance contributions, and that the Respondent was not to rescind its unilateral wage increase unless requested by the Union. Permitting an offset is not inconsistent with either order. Clearly, employees are to retain the 15-cent wage increase. To the extent that the increase does not make them whole for costs incurred in making insurance contributions, they would be entitled to that additional relief. They are not, however, entitled to a windfall.

My colleagues say that I am modifying the enforced Order because I am rescinding the wage increase without a union request to do so. I am not rescinding the wage increase. The wage increase remains in effect. However, as to the separate violation, viz. the requirement of a contribution for health insurance, I am permitting an offset. To do otherwise would be to leave the employees better off than they were before the unlawful changes. That is beyond what a compensatory remedy should do.

Finally, my colleagues say that I am taking away 7 years' worth of wage increases. As I see it, I am placing the employees in the same financial position that they would have been in for those 7 years if the changes herein had not been made.

Dated, Washington, D.C. May 24, 2004

Robert J. Battista, Chairman

[1] If the increase does not fully cover the additional premiums, the employees are entitled to the difference.

NATIONAL LABOR RELATIONS BOARD

*Rosalind Eddins, Esq.*, for the General Counsel.
*Ronald G. Ingham,* and *Ian K. Leavy Esqs.*, for the Respondent.
*Edward Cottongim,* for the Charging Party.

SUPPLEMENTAL DECISION

GEORGE CARSON II, Administrative Law Judge. This case was submitted by stipulation dated August 14, 2003, and filed on August 17, 2003. On September 2, 2003, Associate Chief Administrative Law Judge William N. Cates issued an order accepting the stipulation and assigned the matter to me. The only issue is whether a unilateral wage increase instituted by the Respondent should be an offset to its liability for a unilateral increase in the cost of employee health care benefits that the Respondent imposed upon its employees.

On the entire record, and after considering the position statements of all parties and the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. PROCEDURAL HISTORY

On July 16, 1997, Administrative Law Judge Richard J. Linton issued a decision in which he found that the Respondent violated the National Labor Relations Act by, inter alia, withdrawing recognition from the Union, unilaterally granting pay raises, and unilaterally changing medical insurance coverage or rates for bargaining unit employees. His recommended order, in subparagraph 1(b), required the Respondent to cease and desist from unilaterally granting pay raises. In subparagraph 1(c), the Respondent was ordered to cease and desist from unilaterally changing medical coverage or rates. Judge Linton's recommended order, at subparagraph 2(f), provided that the Respondent, if requested by the Union, must "rescind either or both of the early October 1995 unilateral changes concerning wage rates and medical insurance coverage." On August 28, 2000, in *Scepter Ingot Castings,* 331 NLRB 1509 (2000), the Board adopted Judge Linton's findings but modified his recommended order by inserting an additional subparagraph, 2(g), that provides:

> (g) Make employees whole for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions, as set forth in *Kraft Plumbing & Heating,* 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Id. at 1510.

On February 22, 2002, the Court of Appeals for the District of Columbia Circuit entered a judgment enforcing the Board's Order without any modification. *Scepter Inc. v. NLRB,* 280 F.3d 1053 (D.C. Cir. 2002).

On April 8, 2003, the Regional Director for Region 26 issued a compliance speciation alleging the amounts due to employees under the Board's Order. The parties have stipulated that the amounts set out in Appendix A are the amounts due to the employees if the Respondent is not permitted to offset the medical insurance contribution by the wage increase.

The Respondent filed a timely answer to the compliance specification on April 28, 2003, and, on May 16, 2003, filed an amended answer. The amended answer affirmatively pleads the offset. Its calculations reflect that the unilateral wage increase more than covered the insurance contribution costs of employees who worked for more than 2080 hours annually.

The parties have stipulated that the foregoing decisions and pleadings, together with the Respondent's October 4, 1995 memo to employees, constitute the entire record. That memorandum announces the implementation of insurance cost contributions effective October 1, 1995, and thereafter states:

> To help offset this new employee contribution, your rate of pay will be increased by $.15 per hour effective 12:00 a.m., October 2, 1995. This pay rate adjustment is a one time adjustment and will be reflected in the pay rate schedule published in a separate document.

II. CONTENTIONS OF THE PARTIES

The stipulation sets out the contentions of the parties. The Respondent contends that the 15-cent-per-hour pay increase announced in its memorandum "was identified to bargaining unit employees as an offset to their medical premium contributions," that there has been no adverse economic impact upon the employees, and that it is not liable for the amounts set forth in Appendix A of the compliance specification.

In its brief, the Respondent predicates its arguments upon the proposition that "the employees would not have received the increased wages if the Respondent had not required contributions to the Health Plan." The foregoing proposition fails to note that each action violated the Act. The Board specifically found two separate unilateral changes that each constituted a separate unfair labor practice.

The Respondent cites *Florida Steel Corp.,* 273 NLRB 889 (1984), noting that, in that case, amounts paid in partial compliance with a Board Order were to be taken into account when determining the final amount of liability. In the instant case, no amounts have been paid in partial compliance with the Board Order.

None of the additional cases cited by the Respondent relate to the issue presented herein. In *Banknote Corp. of America,* 327 NLRB 625 (1999), the Board affirmed the administrative law judge's determination that an employer "need not reimburse employees to the extent that it required them to contribute to the new insurance plan." Id. at 628. That case involved a successor employer that was privileged to set initial terms and conditions of employment. The employer initially informed employees that their current health plan would be continued for 60 days. Although it altered the plan prior to the end of the 60-day period, employees were not required to contribute until after the 60-day period. *United States Can Co.,* 328 NLRB 334 (1999), enfd. 254 F.3d 626 (7 Cir. 2001), discussed offsets for retirement and supplemental unemployment benefits. It did not address a claimed offset for a wage increase unlawfully granted pursuant to a separate unilateral change in employees' working conditions.

The General Counsel and the Union contend that the 15-cent per-hour increase violated the Act "and should not be considered as an offset for the other unilateral change (employee contribution toward premiums)."

The General Counsel, citing *Intermountain Rural Electric Assn.*, 317 NLRB 588 (1995), enfd. 83 F.3d 432 (1996), argues that the Respondent should not be permitted to "reap the fruits of its unlawful action." The Board, in holding that the financial harm caused by the respondent's modification of the overtime selection process in that case was "distinct from the financial impact of the Respondent's other unfair labor practices," states:

> Thus, the fact that the Respondent may have provided backpay to employees who suffered losses as a result of the unlawful unilateral changes pertaining to premium pay eligibility and insurance premium obligations does not relieve the Respondent of liability for the financial consequences of its change in the callout and standby overtime selection procedures. Contrary to the judge, therefore, we find that the presumption that some backpay is due to remedy the effects of the Respondent's unlawful action is properly applied in this case. Id. at 590.

## III. ANALYSIS AND CONCLUDING FINDINGS

The Respondent, in arguing that its unlawful wage increase compensated employees for the cost of its unlawfully imposed insurance contribution, is arguing "no harm, no foul." That argument ignores that there were two fouls, the unilateral contribution requirement and the unilateral wage increase. Accepting the figures in the Respondent's amended answer, the wage increase fully offset the employee insurance contribution for employees who worked for 2,080 hours. Thus, the Respondent could have, without making any unilateral changes, simply paid the increased insurance cost. The Respondent chose not to do so. Instead, the Respondent unilaterally imposed employee contributions for insurance contemporaneously with its withdrawal of recognition from the Union in early October 1995, and, further in derogation of its bargaining obligation, it simultaneously announced that it was increasing wages to "offset this new employee contribution."

In arguing that the unilateral wage increase should be applied as an offset, the Respondent is seeking to reduce its liability for its own wrongdoing, the unilateral institution of insurance contributions, by its separate wrongful act of increasing wages without notice to or bargaining with the employees' certified collective-bargaining representative. The foregoing actions were taken contemporaneously with its unlawful withdrawal of recognition from the Union. The Board, in adopting the cease and desist provisions of Judge Linton's recommended order, found that the foregoing unilateral actions constituted separate violations as reflected in its Order which, in subparagraph 1(b), requires the Respondent to cease and desist from unilaterally granting pay raises, and, in subparagraph 1(c), requires the Respondent to cease and desist from unilaterally changing medical insurance coverage or rates.

Judge Linton's decision specifically notes that the Respondent, in its memo of October 4, 1995, informed employees that the wage increase was "'[t]o help offset' the new contribution now required from employees." *Scepter Ingot Castings*, supra at 1514. Despite this, Judge Linton found that each of the unilateral changes separately violated the Act. His recommended Order, at subparagraph 2(f), provided that, if requested by the Union, the Respondent must "rescind either or both of the early October 1995 unilateral changes concerning wage rates and medical insurance coverage." [Emphasis added.] The Board adopted that portion of Judge Linton's recommended Order without modification. The absence of any modification is fully consistent with established precedent that nothing in remedial orders relating to unilateral changes "is to be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union." *Wire Products Mfg. Corp.*, 328 NLRB 855 at fn. 2 (1999). See also *U.S. Marine Corp.*, 293 NLRB 669, 671 at fn. 6 (1989). Rather than simply adopting Judge Linton's recommended order permitting the Union to request rescission of either or both of the unilateral changes, the Board specifically inserted a new paragraph, subparagraph 2(g), providing that the Respondent "[m]ake employees whole for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions." There is no language relating to any potential offsets. The Board's Order was enforced without modification by the court of appeals.

In *Grinnell Fire Protection Systems Co.*, 337 NLRB 141 (2001) the Board, citing longstanding precedent, explained that it has no authority to modify an enforced order because "Section 10(e) of the Act provides that upon the filing of the record in a United States court of appeals, 'jurisdiction of the court shall be exclusive and its judgment and decree shall be final . . . "' Id., slip op. at 2.

The Board's Order, enforced by the Court of Appeals, finds two separate and distinct unilateral changes and provides that, upon the request of the Union, either or both of those changes must be rescinded. It further provides, with no mention of offsets, that employees be made whole "for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions."

The parties have stipulated that, in the event the Respondent is not permitted to offset the medical insurance increase by the wage increase, the amounts set out in Appendix A of the compliance specification are the amounts due to the employees.

In view of the foregoing and on the entire record, I issue the following recommended[1]

## ORDER

The Respondent, *Scepter Ingot Castings, Inc.*, New Johnsonville, Tennessee, its officers, agents, successors, and assigns, shall make whole the employees named in Appendix A of the compliance specification by payment to them of the amounts set forth therein, together with interest thereon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Dated, Washington, D.C. October 15, 2003

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.